Supreme Court, U. S.
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MICHAEL RODAK, JR., CLE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

Case No. 79-1671

Roy Warner, et al.,

Petitioners,

v.

Sovereign News Company, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For the Sixth Circuit

BRIEF OF AMICUS CURIAE [redacted] OF OHIO

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BRIEF OF AMICUS CURIAE WILLIAM J. BROWN ATTORNEY GENERAL OF OHIO

William J. Brown, Attorney General of Ohio, pursuant to Rule 42(4) of the Rules of this Court, hereby submits his brief as an *amicus curiae* in support of petitioners Roy Warner, *et al.*

STATEMENT OF THE CASE

Respondent, Sovereign News Company, is a distributor of books, magazines and film located in Cleveland, Ohio. It instituted this action against the prosecuting attorneys of Cuyahoga and Montgomery Counties and certain members of the police departments of Cleveland and Dayton, Ohio. Respondent claimed that a search of its premises by the Cleveland and Dayton police officers had violated its rights under the Federal Constitution and state law. It also claimed

that the statutes employed to authorize the search, Section 2907.32, which prohibits the pandering of obscenity, and Section 2907.01(F), which defines obscenity, were unconstitutional. Respondent requested a preliminary injunction enjoining the defendants from disposing of, or using in any way, the materials seized in the search; a permanent injunction suppressing the use of the seized materials and requiring their return to respondent; a declaratory judgment that the state statutes were unconstitutional; and an award of compensatory and punitive damages.

The Attorney General, who was invited to file a brief *amicus curiae,* and the defendants argued that the District Court should abstain from deciding the merits of the claim under the principles established in *Younger v. Harris,* 401 U.S. 37 (1971), since the requested relief would constitute an unwarranted interference with the state's enforcement of its criminal laws. They also argued that the court should abstain, under the authority of *Railroad Comm. v. Pullman Co.,* 312 U.S. 496 (1941), since the state supreme court might construe the challenged statutes in a manner which might eliminate, or substantially modify, the constitutional claim of respondent.

The District Court did abstain from deciding the claims against the Montgomery County and Dayton defendants. It refused, however, to abstain from deciding the claims against the Cuyahoga County and Cleveland defendants and held that the challenged statutes were unconstitutionally overbroad and vague since they did not comply with the requirements set forth in *Miller v. California,* 413 U.S. 15 (1973).

While the case was pending on appeal, the Supreme Court of Ohio authoritatively construed the challenged statutes to incorporate the guidelines prescribed in the *Miller case. State v. Bergun,* 56 Ohio St.2d 354 (1978).

The Court of Appeals remanded the case to the District Court for consideration in light of the decision in the *Bergun case.*

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The District Court stated that it was not required to abstain because there were no state grand jury or judicial proceedings pending in Cuyahoga County. It also stated that respondent had shown "extraordinary circumstances" which justified federal relief since it was threatened with multiple prosecutions.

The Court of Appeals did not discuss the abstention issue. It merely remanded the case for further consideration in light of the decision of the Supreme Court of Ohio in *State v. Bergun,* 56 Ohio St.2d 354 (1978).

The Attorney General respectfully submits that the refusal of the lawyer court to abstain is contrary to the principles established by the applicable decisions of this Court. Those decisions establish that, while the absence of an ongoing state proceeding is a relevant consideration in determining the propriety of federal relief, it is not controlling. A federal plaintiff is not entitled to a determination of the merits of his claim merely because he wins the race to the court house and obtains a hearing before formal state proceedings are instituted.

The Attorney General recognized that this Court has held that federal relief is permissible if there is no pending state proceeding. In those cases, however, the federal plaintiff had refrained from the disputed conduct until he obtained a judicial determination of its validity. In *Steffel v. Thompson,* 415 U.S. 452 (1974), the plaintiff refrained from distributing handbills until his constitutional claim was determined. The same was true of the plaintiffs who obtained relief in *Doran v. Salem Inn, Inc.,* 422 U.S. 922 (1975). After an ordinance was enacted prohibiting topless dancing, they stopped providing such dancing in their bars.

Respondent, however, did not attempt to obtain a prior judicial determination of the validity of its conduct. It was not until respondent believed that the state was about to institute enforcement proceedings against it for that conduct, that it sought judicial relief.

In the absence of a showing of "extraordinary circumstances," this Court has never held that a federal court may enjoin state authorities from instituting proceedings against someone who had violated state law. In those cases in which federal relief has been granted to a plaintiff who has violated state law, the relief has been limited to permit the state to proceed against him for his past conduct. One of the plaintiffs in *Wooley v. Maynard,* 431 U.S. 705 (1977), had already engaged in the disputed conduct. The opinion emphasized the fact that the relief would not interfere with the state's ability to proceed against him for that conduct. He has been convicted for that conduct and had served his sentence. The plaintiff was not seeking any relief with respect to that conviction. The relief sought was wholly prospective. *Id.* at 711.

In *Cline v. Frink Dairy Co.,* 274 U.S. 445 (1927), this Court enjoined that state from instituting prosecutions of the plaintiff for future violations of the challenged anti-trust statutes but permitted the state to prosecute the plaintiff for its past violations. *Id.* at 452-453.

In most cases, however, this Court has held that a plaintiff who has violated the law, without attempting to obtain a prior judicial determination of the validity of his conduct, is not entitled to federal relief. *Fenner v. Boykin,* 271 U.S. 240 (1926); *Spielman Motor Sales Co. v. Dodge,* 295 U.S. 89 (1935); *Beal v. Missouri Pac. R. Co.,* 312 U.S. 45 (1941); *Watson v. Buck,* 313 U.S. 387 (1941); *cf. Walker v. Birmingham,* 388 U.S. 307, 320 (1967).

The Attorney General submits that the distinction between plaintiffs seeking guidance as to their future conduct and those seeking to immunize their past conduct from state enforcement proceedings is a reasonable one. Providing a forum to the plaintiff who wishes to determine in advance the validity of desired conduct, enables him to avoid the dilemma of either foregoing activity which he believes is constitutionally protected or of violating the law and risking punishment if his assessment of the law is incorrect.

If the plaintiff refrains from acting until he obtains a judicial determination of his claim, federal relief would not result in duplicative legal proceedings or disruption of the state criminal justice system and could not be interpreted as

reflecting negatively on the state courts ability to enforce constitutional principles. *Steffel v. Thompson, supra,* 415 U.S. at 462.

The interests of both the plaintiff and the state are vastly changed where the plaintiff has already engaged in the disputed conduct. Such a plaintiff does not have the same need for federal relief. He is not being deterred from any activity. He has chosen to act and risk the consequences. If the state authorities decide to institute enforcement proceedings against him, he will have the opportunity to raise his constitutional claims and have them determined in those proceedings. If such proceedings are not instituted, there will be no need for relief. *The Supreme Court 1970 Term,* 85 Harv. L. Rev. 3, 309-310 (1971); Note, *Criminal Declaratory Relief,* 80 Harv. L. Rev. 1490, 1503-1504 (1967).

Once the plaintiff has engaged in the disputed conduct, the state's interest in the enforcement of its criminal laws becomes involved. If the federal court refuses to abstain, it is the state which is faced with the dilemma. It will have to choose either to engage in duplicative litigation, and risk a federal injunction, or to refrain from instituting proceedings to enforce its criminal laws until the final determination of the federal suit. *Trainor v. Hernandez,* 431 U.S. 434,445 (1977).

Refusal to abstain also creates the risk of duplicative litigation. This is true even if the state authorities, either voluntarily or because they have been enjoined, refrain from acting until final resolution of the federal auit. The state would be free to prosecute him at that time if the plaintiff failed to prevail on the merits of his claim that the statutes are unconstitutional. Even if he can show that the statute is facially invalid, the state might still be free to prosecute him. If the state courts give the statutes an acceptable limiting construction, prosecutions can be brought and proper convictions obtained for conduct prior to the narrowing construction. *Younger v. Harris, supra,* 401 U.S. at 50.

Respondent had been indicted in Hamilton County and Montgomery County for violating the same statutes which were challenged in the instant case. The District Court found that the possibility of a third prosecution in Cuyahoga County constituted the "extraordinary circumstances" which would

justify federal relief. The Attorney General submits that this finding is also in conflict with the applicable decisions of this Court.

This Court has explained that in order to justify federal relief, the circumstances must be extraordinary in the sense of creating an extraordinarily pressing need for immediate federal relief. *Moore v. Sims,* _____ U.S. _____ , 99 S.Ct. 2371, 2382 (1979); *Kugler v. Helfant,* 421 U.S. 117, 124-125 (1976). The Attorney General respectfully submits that possibility of enforcement proceedings in Cuyahoga County does not create such a need for federal relief. If such proceedings are instituted respondent will have the opportunity to present his constitutional claims and have them determined in those proceedings. *Compare Juidice v. Vail,* 430 U.S. 327, 337 (1977).

Wooley v. Maynard, 431 U.S. 705 (1977), relied upon by the District Court, is readily distinguishable from the instant case. One of those plaintiffs had been prosecuted and convicted under the challenged law three times within a five week period and both plaintiffs were faced with repeated prosecutions in the future. Since, as this Court found, the use of an automobile was a virtual necessity, there was no way that they could refrain from the disputed conduct until they obtained a judicial determination of its validity. The challenged law required them to either disseminate an ideological message which was contrary to their beliefs or be prosecuted. *Id.* at 713-715. In addition, unlike the respondent, they did not seek to prevent the state from proceeding against them for past violations of the law. The relief sought was wholly prospective. *Id.* at 711.

Multiple unsuccessful prosecutions could also constitute "extraordinary circumstances" if it were shown that the state authorities were not instituting the prosecutions with any reasonable expectation of obtaining valid convictions but merely to harass the plaintiff. *Dombrowski v. Pfister,* 380 U.S. 479 (1965). No such showing was made in the instant case. There is nothing in the record which could justify a finding that the state authorities had any purpose other than the good faith attempt to enforce the state criminal laws.

The only reason that respondent is threatened with three prosecutions is that it has violated the law in three separate jurisdictions without attempting to obtain a judicial determination of the validity of its conduct. The Attorney General respectfully submits that a multiple offender is even less deserving of relief than a person who has violated the law for the first time.

The Attorney General submits that the considerations set forth in *Moore v. Sims, supra,* 99 S.Ct. at 2380, are particularly evident, and emphatically counsel abstention, in the instant case. The *Pullman* concern, that a federal court's interpretation of state law might later be discredited, was not merely a possibility but an actuality in the instant case. The District Court found the state statutes unconstitutional because it interpreted them to fail to incorporate all of the requirements for obscenity set forth in *Miller v. California,* 413 U.S. 15 (1973). While the case was pending on appeal the state supreme court authoritatively construed the statutes to incorporate the requirements for obscenity set forth in the *Miller case. State v. Bergun,* 56 Ohio St.2d 354 (1978).

The second consideration mentioned was the need for a concrete case or controversy. This Court has permitted pre-enforcement challenges to state statutes only where the statute applied particularly and unambiguously to activities in which the plaintiff engaged or sought to engage or where there was some specific threat of enforcement directed personally to the plaintiff. *Ellis v. Dyson,* 421 U.S. 426, 447-449 (1975) (Powell, J., dissenting). Neither factor is present in the instant case. The District Court, however, still found that respondent had standing to challenge the statutes with respect to petitioners because petitioners were investigating respondent and the search warrant was directed in part to petitioners. This may have been sufficient to cause respondent to genuinely believe that it would be prosecuted. It is not, however, sufficient to give respondent standing. *Younger v. Harris, supra,* 401 U.S. at 41-42; *Steffel v. Thompson, supra,* 415 U.S. at 476 (Stewart, J., concurring).

Even if respondent has shown a sufficient injury to satisfy the case or controversy requirement, the case was still inappropriate for judicial resolution. In order to reach the

merits of the claim, the District Court was required to speculate as to the specific type of materials which respondent would distribute and to engage in a line by line analysis of the statutes to determine how petitioners would react to the distribution of such hypothetical materials. *Younger v. Harris, supra,* 401 U.S. 52-53; *United Public Workers v. Mitchell,* 303 U.S. 75, 89-90 (1947).

The final consideration mentioned was the threat to our federal system of government by preventing the state courts from construing and applying the challenged statutes in light of the constitutional objections. Almost every constitutional challenge to a state statute offers an opportunity for a narrowing construction that might obviate the constitutional problem. To deny the state court an opportunity to do so prevents the informed evolution of state policy by the state courts. *Moore v. Sims, supra,* 99 S.Ct. at 2380; *Trainor v. Hernandez, supra,* 431 U.S. at 445-446; *Huffman v. Pursue Ltd.,* 420 U.S. 592, 604 (1975).

The Attorney General submits that the instant case shows the need for this Court to clearly establish that, in the absence of extraordinary circumstances, federal courts should refrain from enjoing state authorities from instituting proceedings against one who has violated state law without attempting to obtain a prior judicial determination of the validity of his conduct. The challenged state statutes have been authoritatively construed to incorporate the guidelines for obscenity set forth in *Miller v. California, supra,* 413 U.S. 15. It is, therefore, likely that the statutes will ultimately be found constitutional. *Ward v. Illinois,* 431 U.S. 767 (1977). The petitioners, however, have been enjoined from enforcing those statutes for more than two and a half years. The Attorney General submits that in view of the fact that respondent would have had the opportunity to raise his constitutional claims and have them determined in any enforcement proceeding which petitioners might have instituted, such an interference with the state's criminal justice system was entirely unwarranted.

CONCLUSION

For the above reasons the Attorney General respectfully submit that the Petition should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief of Amicus Curiae William J. Brown, Attorney General of Ohio, was sent this 21st day of May, 1980 by United States first class mail, postage prepaid, to Bernard A. Berkman, Berkman, Gordon, Levy, Murray & Palda, 2121 Illuminating Building, 55 Public Square, Cleveland, Ohio 44113, Attorney for Sovereign News Company; James A. Brogan, First Assistant Prosecuting Attorney, Montgomery County Courts Building, 41 North Perry Street, Dayton, Ohio 45402; Thomas P. Gill, Assistant Prosecuting Attorney, Office of the County Prosecutor, Justice Center, Ninth Floor, 1200 Ontario Street, Cleveland, Ohio 44113; and Bruce A. Taylor, 440 Leader Building, Cleveland, Ohio 44114, Attorney for Petitioners.

THOMAS V. MARTIN